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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No. 820.

MADELINE V. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A REHEARING.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petitioner, Madeline V. Smith, respectfully presents this, her petition for a rehearing, and states that in so doing she is conforming with the rules of this Court with respect to the requirements of such a petition.[1]

The new matters presented and emphasized in this petition are these:

[1]Supreme Court Rule 58.

(1) That during the trial a question arose in connection with the books of account which had been kept by the defendant in her business. These books had been examined by the witness Norris, a Government Intelligence Agent.

For the purpose of emphasizing this question, we quote from the record (App. 205a, 206a, 207a, 208a—Direct testimony of Hubert Norris):

Q. Mr. Norris, after you had these photostats made, and I ask you whether those are photostats of the records furnished you by Mr. Tual on behalf of Mrs. Smith?

A. Yes, sir.

Q. What happened to the originals after you made these photostats?

A. They were returned.

Q. To Mrs. Smith?

A. They were returned to Mr. McBride.

Q. Who then represented Mrs. Smith?

A. Yes, sir.

Q. Have you seen them since?

A. No, sir.

Q. If they were lost, stolen, or destroyed, you don't know? You sent them back? (1132).

A. We returned them to Mr. McBride.

Q. Necessarily, these photostats do not show the color ink in which they were written?

A. The writing all appears in white and the rest is in black.

Q. They are negative photostats, so to speak. Did you make an examination of the originals, and from the originals make certain notations on the back of your photostats as to the color ink involved in the various entries?

A. Yes, sir.

Q. I will ask you whether or not you have some there?

A. Yes, sir.

Q. On which you made such notations?

A. I do.

Q. Pick me out one of them there. It doesn't make any difference which one. I don't want your opinion about the handwriting. I just want you to tell me what you saw at that time as to the color ink on any one of them.

A. Would you want me to identify which one I am talking about?

Q. Yes, sir, just identify it, if you will.

Mr. Dave Hanover: I would like him to (1133) give me the page number at the time he is doing it may it please Your Honor?

The Court: *Aren't the originals available at this time?*

Mr. Joyner: *We would like to have them, but we are in no position to have them. Might I inquire of counsel if the originals are available?*

Mr. Dave Hanover: *We would like to have a conference about that, may it please the Court.*

Mr. Joyner: *We don't make any point about it. That is all right.*

Mr. Dave Hanover: *Of course, that puts us in a very bad position, calling on us at this time to produce evidence.*

Mr. Joyner: *We are not requesting you to produce evidence at all. We don't want the record to indicate that we are.*

Mr. Dave Hanover: *You have done it in the presence of the jury, Mr. Joyner.*

The Court: We will go ahead with the other photostats.

Mr. Joe Hanover: I think the jury should be instructed not to consider what has taken place.

Mr. Dave Hanover: If Your Honor please (1134), we would like a conference about that because I don't know what light the jury might take of my conduct now. I don't know whether we would like to produce them or not.

The Court: We are magnifying something that is not too important here. I did instruct the jury not to consider the Court's instructions.

Mr. Dave Hanover: We will give it to them right now.

The Court: It might save us all a little trouble expediting the matter.

Mr. Dave Hanover: Of course, we are producing it, but we are reserving an exception to Mr. Joyner's remarks.

The Court: Just a moment. The records will not be accepted under those conditions. The defendant is not required to give evidence of any character against herself, if that is the point you are making at this time.

Mr. Dave Hanover: We wanted to produce them at the proper time.

The Court: That is ended, and the jury will not consider it.

Mr. Joyner: We decline them (1135).

Mr. Dave Hanover: We are offering them.

The Court: Do you offer them freely and voluntarily at this time?

Mr. Dave Hanover: We offer them under the circumstances under which they were requested, may it please the Court.

The Court: Just a moment. Defense counsel has produced what appears to be two loose leaf ledgers, and from which the photostats about which the witness is about to testify were taken. Now he was about to testify concerning the ink, the type of ink, which was used in

making the entries onto the original ledger sheet. Without stopping to consider for one moment that there is any question—I don't know how important it is, the type of ink that was used, in the first place—but not stopping to consider for a moment that it made any difference, one way or the other, the Court suggested that if the original were available at this time it might expedite this particular phase of the investigation if they were made available.

Now, counsel for the defendant has produced these two loose leaf binders and they are on the (1136) table, but they are not freely and voluntarily produced. And it is certainly not proper to require the defendant to give evidence against herself, if it may be considered that. In the circumstances here, I don't think it is. But under these conditions, as I say, the tender of defense counsel is declined. The Government counsel will proceed with the examination of the witness, using the photostats about which the witness was about to testify.

Mr. Joyner: Let the record show these are being shoved out of Government counsel's way and back over to defense counsel's table at this time.

Mr. Dave Hanover: Let the record show that the books for 1949 and 1950 are on the counsel table.

Mr. Fitzhugh: They are in front of you.

The Court: All right, that settles that, Gentlemen. No more about that. That is settled (App. 211a, Motion for Mistrial).

(The following occurred at the bench, and out of the presence and hearing of the jury:)

Mr. Hanover: In view of what transpired in connection with the books, we had no way in which to extricate ourselves without doing prejudice to ourselves, and we feel that the whole incident prejudiced the jury against

the defendant, and we therefore ask the Court to grant us a mistrial.

The Court: No, if anything happened that (1142) would give the jury the wrong impression about it, it was something you gentlemen who represent the defendant did yourselves. That is what the Court would like to observe about it. And, in any event, there was not any prejudice one way or another about it.

Mr. Fitzhugh: Let the record show I did not see the books, either.

The Court: And so—

Mr. Dave Hanover: The record shows that you saw the bound volumes. You did not look into the books, but the record shows the bound volumes were there.

Mr. Joyner: After you slammed them up in front of us.

Mr. Fitzhugh: After you slammed them up there.

The Court: You are making what sort of motion?

Mr. Hanover: Sir?

The Court: You are making what sort of motion?

Mr. Dave Hanover: My motion is for a mistrial (1143.)

The Court: Well, it is overruled.

Mr. Hanover: Of course, I want to make this further observation, that the whole thing transpired in the presence of the jury (Adjournment).

It was error not to enter a mistrial, for the reason that the said request in the presence of the jury amounted to a request or demand made upon the accused, after it was apparent that the books or copies of what the witness was testifying to were in the defendant's possession, and the defendant was required either to produce it, deny, or explain it, or by her very silence, permit inferences to be drawn against her, quite as prejudicial as positive testimony would be. This was further error, for the further

reason that the evidence required to be produced was incriminating in nature, and to produce such evidence under the circumstances then and there existing, in the presence of the jury, would have required the defendant to produce evidence against herself, in violation of the Fifth Amendment of the Constitution of the United States.

It was further error not to enter said mistrial, for the reason that it was all highly prejudicial to the defendant's rights, and no amount of instructions to the jury could overcome the prejudice created, in that a substantial right of the defendant was violated.

McKnight v. *U. S.*, 6th Cir., 115 F. 2d 972, 977, 978, 979, 980, 981.
Meter v. *United States*, 5th Cir., 120 Fed. 504-505.
Hibbard v. *U. S.*, 7th Cir., 172 Fed. 66, 71, 72.

(2) The witness Norris, the Intelligence Agent who testified as an expert for the Government, was allowed, over the objection of the defendant, to testify as to what he had found in the books of appellant, and in his discussions with former clients, for the year 1948, not being a year for which she was indicted for failing to pay sufficient income tax.

The witness testified (App. 180a, 181a) that for the year 1948, the *witnesses he found, the figures, the books,* and *the pattern,* were the same as were the same items for 1949 and 1950. Counsel objected, on the grounds that the jury was the best judge of what the witnesses who testified relative to 1949 or 1950 said or did, and not Mr. Norris. This objection was overruled. Here again, the witness Norris gave his conclusions as to 1948, which placed him in the position of passing on the credibility of the persons he contacted, and the credibility of the Government's witnesses for 1949 and 1950, and the weight to be given their testimony.

(3) At the conclusion of the Government's proof a motion was made by the defendant to strike from the record the testimony of the witness Hall, a bank auditor, who was used by the Government in an attempt to corroborate or to establish its case by the "deposit and withdrawal" method. On cross-examination of the witness, it was admitted by the witness Hall that approximately $32,000.00 of the funds alleged to have been deposited by the defendant in the year 1949 was merely a transfer of funds from a savings account to a building account. (App. 114a, 115a, 116a, 117a). Inasmuch as this created a fictitious figure, it could serve but one purpose, and that, to prejudice the defendant, in that, by the direct testimony of the witness, it created the inference that the defendant had actually more income than she reported. The Witness Hall testified on direct examination that $31,899.00 was withdrawn from savings account 109604 during the year 1949. Government counsel, in their zeal to convict, made no effort to show by this witness the $30,000.00 withdrawn from savings account 109604 as redeposited during the year 1949 in the building account, and $1,899.00 deposited in a checking account. The computations of the witness Hall (App. 110a, 111a, 112a, 113a) were contained in an exhibit marked as "Exhibit No. 11." (App. 113a). Thus it was that there was created in the minds of the jury a fictitious figure of $61,597.13, as being deposited by the defendant for the year 1949, and that she also had available funds for that year of $97,492.19, when, as a matter of fact, these figures were subject to be decreased by $31,899.00. These admittedly incorrect figures by the witness Hall were highly prejudicial to the defendant, and no doubt it assumed an existence in the minds of the jury.

(4) A series of errors was committed in the course of the trial, which in their cumulative effect, taken as a

whole, show the extreme prejudice suffered by the defendant, to the extent that there was a denial of a fair trial.

In his cross-examination of Mrs. Irene MacDonald, secretary to the defendant, and a witness in her behalf, Mr. Vaden, whenever the witness answered either that she did not know, or did not remember, would read from memoranda in his hands concerning certain purchases made by the defendant (App. 227a, 228a, 229a, 230a, 231a, 232a).

When objection was made to this prejudicial type of examination, Mr. Vaden announced that he would withdraw the statement made by him. This practice was repeated, and after the Court *suggested that it was not proper* (App. 230a), the same type of prejudicial cross-examination was continued. This was highly prejudicial, for the reason that "evidence" was given the jury that was not otherwise presented, and was, in effect, "testimony" by Government counsel, and designed to inflame the jury against the defendant.

During the testimony of Jack A. Estes, a Government witness, during which he testified that he had paid his attorneys, Johnson, Miller & Collins, on two occasions, a total sum of $136.00, for which he had receipts to show that said sums had been received from him by his attorneys, to be paid to the defendant who was his wife's attorney, an attempt was made by the Government to introduce the receipt, an objection was made (App. 120a, 121a, and 122a). Then the following occurred:

Mr. Walsh: If your Honor please, we object to the introduction of these exhibits except for the purpose of showing that money was paid to his lawyer.

Mr. Joyner: *Does counsel contend Mrs. Smith didn't receive it?*

Mr. Walsh: If Your Honor please, I have made my objection to the Court.

The Court: The objection is overruled.

Mr. Walsh: Note an exception.

The Court: Again, the objection goes rather to the weight to be given it here. As a matter of fact, the witness says he paid the money to his sister—

Mr. Walsh: If Your Honor please, that is what—

The Court: (Continuing)—*Stating that* (943) *it was to be paid to Mrs. Smith. As to whether or not she received it, it will be up to the Government to prove it.*

Mr. Walsh: That is right, Your Honor, and that is the purpose of our objection.

The Court: *Well, so we can get down to it, does she deny receiving this money?*

Mr. Dave Hanover: Your Honor we don't make any statement about that at this time.

The Court: All right, the evidence is competent—

Mr. Dave Hanover: Note our exception.

The Court (Continuing): For what it is worth. All right.

(Said two receipts were accordingly marked as Collective Exhibit 1 to the testimony of Mr. Estes, and same will be found among the exhibits hereto.)

Not only was the evidence incompetent to show payment to the defendant, but the conduct of the Court, and the Assistant District Attorney in asking in the presence of the jury if the defendant denied receiving the money, was highly prejudicial, for the reason that it required the defendant to give incriminating evidence against herself, contrary to the Fifth Amendment to the Constitution of the United States. As was said in *McKnight* v. *U. S., supra,* the defendant was required to "deny, or explain it, or by her

very silence, permit inferences to be drawn against her, quite as prejudicial as positive testimony would."

The burden was on the Government to show that the defendant had received taxable income, and by thus placing the defendant on a so-called "spot," without a denial, could leave but one inference with the jury. The Court's remarks regarding the purpose of the witness' testimony further emphasized the Government's contention in the matter, and coupled with the refusal to sustain the defendant's objection, clothed this testimony with the character of competent evidence.

During the direct testimony of a witness for the Government, in an attempt to show that the defendant was attorney for a certain person, and after objection had been made to the witness' testimony, the following occurred (App. 73a):

Q. Mr. Dunavant, refer, I think it is number—,

Mr. Joyner: *If there is no contention about that, would you like to stipulate that she is one of the attorneys of record?*

Mr. Dave Hanover: I am going to try my case as I go along, Mr. Joyner.

Mr. Joyner: All right.

This was highly prejudicial, and violated the defendant's constitutional rights, and required the defendant to give incriminating evidence against herself.

Although Government counsel made a request with reference to a "stipulation," it required either an admission or a denial from the defendant.

The District Attorney made certain inflammatory remarks with reference to the fees defendant was alleged to have charged (App. 306a, 307a), which were in the con-

cluding argument of Mr. Fitzhugh, and were designed to inflame and prejudice the jury against the defendant, in that she overcharged her clients, *that she charged $750.00 for five or ten minutes' work.*

Mr. Joyner, Government counsel, stated to the jury in his opening argument to the jury that certain *specified fees* (App. 262a) *did not appear on the defendant's books, and were not reported.* After counsel's objection, which the Trial Court overruled, by stating that the jury would determine what was said by the witnesses, Government counsel stated to the jury that he relied upon the testimony of Mr. Norris for this proof (App. 263a).

The testimony of the witness Norris did not disclose any such testimony. This is prejudicial, in that it amounted to testimony by a government attorney, and vested his statement with credibility and weight, which the ordinary witness would not possess, due to the position of the Assistant District Attorney.

(5) On February 6, 1956, the date of the trial (App. 54a, 55a), counsel advised the Court that the defendant was not ready, and had not had sufficient time to prepare for trial, and submitted to trial under protest.

During the testimony of the witness Hall, an official of the First National Bank, where the defendant did her banking, while testifying as to deposits and withdrawals (App. 88a, 89a, 90a, 91a, 92a, 93a, 94a, 95a, 96a, 97a, 98a, 99a, 100a, 101a, 102a, 103a, 104a, 105a, 106a) counsel objected and complained that the defendant was being taken by surprise in the line of testimony being given by the witness, especially with reference to the years prior to the indictment. Although the Trial Judge contended that counsel was not being taken by surprise, he apparently recognized that counsel was, by tendering

the record to counsel at that time for overnight inspection —evidence the Government had had for months, even years. Counsel accepted the opportunity to inspect the evidence, but certainly it was obvious that counsel during overnight interval could not prepare to meet these issues.

This was highly prejudicial, especially with reference to the years prior to the years alleged in the indictment.

Singer v. *United States*, 3rd Cir., 58 Fed. Rep. 2nd, 74-76.

(6) On January 3, 1956, the defendant filed her motion for discovery and inspection (App. 28a and 29a), to which motion for discovery and inspection was attached as Exhibit "A" (App. 30a and 31a), a letter sent out by the United States Treasury Department dated April 15, 1952, to various clients of the defendant, seeking certain information, as set out in said exhibit.

On pages 24a, 25a, 26a, and 27a, there is set out a letter addressed by the defendant's counsel to the United States District Attorney, which letter was dated December 22, 1955, and which was made an exhibit, and is part of Exhibit "A" to the amended and supplemental motion for a bill particulars (App. 18a).

However, reference is here made to paragraph three of said letter (App. 27a), in connection with the matter now under discussion.

An order was entered January 17, 1956 (App. 31a, 32a), denying the motion for discovery and inspection. The denial of said motion was highly prejudicial to the defendant, and violated a substantial right of the defendant. *Jencks* v. *U. S.*, No. 23, October term, 1956, decided by this Court June 3, 1957, Rule 52, Sec. B., F. R. C. P.

CONCLUSION.

In the belief that a re-examination of the record will compel the conclusion that the petitioner did not have a fair and impartial trial, such an examination is respectfully requested.

Respectfully submitted,

HANOVER, HANOVER, HANOVER, & WALSH,
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Memphis, Tennessee,
By DAVID HANOVER,
Attorneys for the Appellant.

CERTIFICATE.

State of Tennessee, County of Shelby.

The undersigned, David Hanover, attorney for the petitioner, Madeline V. Smith, hereby certifies that the foregoing petition is presented in good faith, and not for delay, and he also certifies that the petition is restricted to substantial grounds available to petitioner, but not previously presented, and in accordance with Rule 58, Sec. 2.

/S/ DAVID HANOVER.
DAVID HANOVER.

PROOF OF SERVICE.

I, David Hanover, one of the attorneys for petitioner, Madeline V. Smith, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25 day of June, 1957, I served 3 copies of the foregoing Petition for a Rehearing on respondent by mailing 3 copies thereof in duly addressed envelope, with adequate prepaid postage, to the Solicitor General of the United States, Washington, D. C.

David Hanover.